No. 19-5672

In the

Supreme Court of the United States

GARY RAY BOWLES, *Petitioner*,

v.

MARK S. INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

EXECUTION SCHEDULED FOR THURSDAY, AUGUST 22, 2019, @ 6:00 p.m.

QUESTION PRESENTED

Whether this Court should grant review of an Eleventh Circuit decision denying a motion to stay the execution pending an appeal of the district court's dismissal of the habeas petition raising a claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014), as an unauthorized successive habeas petition.

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OPINION BELOW

The Eleventh Circuit's opinion is reported at *Bowles v. Sec'y, Fla. Dept. of Corr.*, ___ F.3d ___, 2019 WL 3946888 (11th Cir. Aug. 21, 2019) (No. 19-13150-P).

JURISDICTION

On August 21, 2019, the Eleventh Circuit Court of Appeals denied the motion to stay the execution. On the next day, August 22, 2019, Bowles, represented by the Capital Habeas Unit of the Federal Public Defender Office of the Northern District of Florida (CHU-N), filed this petition for writ of certiorari in this Court. The petition

was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(d). Jurisdiction exists pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution, section one, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Gary Ray Bowles was on probation for robbery when he met the victim, Walter Hinton, at Jacksonville Beach. Hinton allowed Bowles to move into his mobile home in exchange for Bowles helping him move. On November 16, 1994, Hinton, Bowles, and a friend smoked some marijuana and drank some beers. After dropping the friend off at the train station, Hinton went to sleep in his bedroom. Bowles went outside the mobile home and picked up a 40-pound concrete stepping stone. Shortly thereafter, Bowles went into Hinton's bedroom and dropped the concrete stone on Hinton's head, fracturing Hinton's face from cheek to jaw. Bowles then strangled Hinton. Bowles stuffed toilet paper down Hinton's throat and shoved a rag into Hinton's mouth, smothering him. Hinton died of asphyxiation. *See generally Bowles v. State*, 716 So.2d 769, 770 (Fla. 1998); *Bowles v. State*, 979 So.2d 182, 184 (Fla. 2008). Afterward, Bowles drove to get some liquor and then picked up a woman on the beach and brought her back to Hinton's home. *Bowles v. DeSantis*, 2019 WL 3886503, *2 (11th Cir. Aug. 19, 2019). Bowles was arrested about six days later, driving Hinton's car and wearing Hinton's watch. *Id.* at *2. Bowles confessed to the murder both orally and in writing. *Bowles*, 979 So.2d at 184. Bowles entered a guilty plea to first-degree murder. *Bowles v. State*, 716 So.2d 769, 770 (Fla. 1998).[1]

Warrant litigation in federal court

On July 11, 2019, Bowles, represented by the CHU-N, filed a civil rights action, pursuant to 42 U.S.C. § 1983, in federal district court, asserting that he had a federal statutory right, under 18 U.S.C. § 3599, for his federal habeas counsel to represent him during the state clemency proceedings, despite the state providing clemency counsel.

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[1] The State does not detail the 20-plus years of litigation in the state and federal courts in this case due to the word limitation.

Bowles v. DeSantis, Gov. of Fla., et al., No. 4:19-cv-00319 (N.D. Fla. 2019). Bowles also filed a motion to stay the execution. (Doc. #5). On July 17, 2019, the Defendants filed a response to the motion to stay. (Doc. #19). Bowles filed a reply. (Doc. #22). On July 19, 2019, the district court denied the stay. (Doc. #25). On July 24, 2019, the Defendants filed a motion to dismiss the § 1983 action for failure to state a claim. (Doc. #26).

On August 1, 2019, Bowles filed an appeal of the district court's denial of the stay to litigate his § 1983 action in the Eleventh Circuit Court of Appeals. *Bowles v. DeSantis, Gov. of Fla., et al.*, No. 19-12929-P. Bowles also filed a motion to stay his execution to allow time for "meaningful" review of his appeal in the Eleventh Circuit. On August 9, 2019, the Defendants filed a response to the motion to stay. On August 19, 2019, the Eleventh Circuit denied the motion to stay in a published opinion. *Bowles v. DeSantis, Gov. of Fla.*, ___ F.3d ___, 2019 WL 3886503 (11th Cir. Aug. 19, 2019) (No. 19-12929-P).

On August 20, 2019, Bowles then filed a petition for a writ of certiorari in this Court from the Eleventh Circuit's opinion. *Bowles v. DeSantis, Gov. of Fla., et al.*, No. 19-5651. Bowles also filed an application for a stay of the execution. *Bowles v. DeSantis, Gov. of Fla.*, No. 19A203. On August 21, 2019, Defendants filed their brief in opposition and a response to the application for a stay. The petition from the Eleventh Circuit's denial of the stay is still pending in this Court.

On August 14, 2019, Bowles represented by the CHU-N, filed a second federal habeas petition in the federal district court raising an intellectual disability claim based on *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014). *Bowles v. Sec'y, Fla. Dept. of Corr.*, 3:19-cv-00936 (M.D. Fla. 2019) (Doc. #1). Bowles also filed a motion to stay the execution. (Doc. #2). On August 16, 2019, the State filed a motion to dismiss the second petition asserting it was a successive habeas petition filed without the statutory required authorization from the Eleventh Circuit.

(Doc. #8). The State noted that Bowles' first federal habeas petition which was filed in 2008 had raised ten claims, but an *Atkins* claim was not raised in the first habeas petition, despite *Atkins* being decided over six years earlier in 2002. (Doc. #8 at 3 citing *Bowles v. Sec'y, Dept. of Corr.*, 3:08-cv-791 (M.D. Fla. 2008); *Bowles v. Sec'y, Dept. of Corr.*, 608 F.3d 1313 (11th Cir. 2010)). The State also asserted that filing a habeas petition under 28 U.S.C. § 2241 could not be used as a means to evade the Congressional limitations on successive habeas petitions by state prisoners. (Doc. #8 at 13-20). On August 16, 2019, the State of Florida also filed a response to the motion to stay. (Doc. #9). On August 17, 2019, the CHU-N filed a reply citing the Fifth Circuit cases of *In re Cathey*, 857 F.3d 221 (5th Cir. 2017), and *In re Johnson*, 2019 WL 3814384 (5th Cir. Aug. 14, 2019). (Doc. #10). On August 18, 2019, the district court dismissed the second petition for lack of jurisdiction concluding that the petition was actually a successive § 2254 petition filed without authorization from the Eleventh Circuit and denied the stay as moot. (Doc. #11).

On August 19, 2019, Bowles filed an application for authorization to file a successive habeas petition in the Eleventh Circuit Court of Appeals. *In re Bowles*, No. 19-13149 (11th Cir. Aug. 19, 2019). Bowles also filed a motion to stay the execution. On August 20, 2019, the State of Florida filed a response to the application and a response to the motion to stay. On August 21, 2019, the CHU-N filed a reply. The application and stay are still pending in the Eleventh Circuit.

Bowles appealed the district court's dismissal for lack of jurisdiction to the Eleventh Circuit. *Bowles v. Sec'y, Fla. Dept. of Corr.*, No. 19-13150-P (11th Cir. 2019). Bowles also filed a motion for a stay of execution. Respondents filed a response in opposition to the motion to stay. On August 21, 2019, the Eleventh Circuit denied the stay in a published opinion. *Bowles v. Sec'y, Fla. Dept. of Corr.*, ___ F.3d ___, 2019 WL 3946888 (11th Cir. Aug. 21, 2019) (No. 19-13150-P).

On August 22, 2019, Bowles filed a petition for a writ of certiorari in this Court

from the Eleventh Circuit's opinion denying the stay of execution in the appeal of the district court's dismissal. *Bowles v. Inch, Sec'y, Fla. Dept. of Corr.*, No. 19-5672. Bowles also filed an application for a stay of the execution in this Court. *Bowles v. Inch, Sec'y, Fla. Dept. of Corr.*, No. 19A213. On August 22, 2019, Respondents filed a response to the motion to stay.

This is the State of Florida's brief in opposition.

REASONS FOR DENYING THE PETITION

ISSUE I

WHETHER THIS COURT SHOULD GRANT REVIEW OF AN ELEVENTH CIRCUIT DECISION DENYING A MOTION TO STAY THE EXECUTION PENDING AN APPEAL OF THE DISTRICT COURT'S DISMISSAL OF THE HABEAS PETITION RAISING A CLAIM OF INTELLECTUAL DISABILITY BASED ON *ATKINS V. VIRGINIA*, 536 U.S. 304 (2002), AND *HALL V. FLORIDA*, 572 U.S. 701 (2014), AS AN UNAUTHORIZED SUCCESSIVE HABEAS PETITION.

Petitioner Bowles seeks review of the Eleventh Circuit's decision denying a motion to stay the execution pending appeal of the district court's dismissal of his second habeas petition raising a claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014), as an unauthorized successive habeas petition. There is no conflict between this Court's decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007), and the decision of the Eleventh Circuit in this case. This Court created an exception to the prohibition on successive habeas petitions for unripe claims in *Panetti* but the intellectual disability claim was ripe at the time Bowles filed his first habeas petition. There is no conflict between this Court's decision in *Panetti* and the Eleventh Circuit's denial of a stay. Nor is there any conflict between the decision of the Eleventh Circuit denying the motion to stay and that of any other circuit court. The two other circuits that have reached the issue, the Fifth Circuit and the Eighth Circuit, agree with the Eleventh Circuit that *Panetti* does not apply to *Atkins* claims. Alternatively, Bowles cannot make the required *prima facie* showing of intellectual disability to warrant being allowed to file a successive habeas petition anyway. Bowles is not intellectually disabled. His achievement tests and grades in elementary school conclusively rebut his claim of intellectual disability. Because the petition presents an issue about which there is no conflict and because the underlying claim of intellectual disability is meritless, this Court should deny review of this claim.

The Eleventh Circuit's decision in this case

Bowles filed a motion to stay the execution pending the appeal of the district court's dismissal of his second habeas petition for lack of jurisdiction. The Eleventh Circuit denied the stay application in a published opinion. *Bowles v. Sec'y, Fla. Dept. of Corr.*, ___ F.3d ___, 2019 WL 3946888 (11th Cir. Aug. 21, 2019) (No. 19-13150-P). Both the majority opinion and the concurring opinion concluded that the district court properly dismissed the habeas petition as being an unauthorized successive habeas petition over which the district court lacked jurisdiction. The majority concluded that the exception to the prohibition on successive habeas petitions for unripe claims established by this Court in *Panetti v. Quarterman*, 551 U.S. 930 (2007), did not apply because an *Atkins* claim was not an unripe incompetency-to-be-executed claim and the *Atkins* claim could have been raised by Bowles as a claim in his first habeas petition. *Bowles*, 2019 WL 3946888 at *3-*5. The Eleventh Circuit relied on its precedent as well as Fifth Circuit and Eighth Circuit precedent. *Id.* at *5 (citing *Busby v. Davis*, 925 F.3d 699, 713 (5th Cir. 2019); and *Davis v. Kelly*, 854 F.3d 967, 971-72 (8th Cir. 2017)). The Eleventh Circuit concluded that "the district court was right to dismiss it for lack of jurisdiction." *Id.* at *5 (citing *Burton v. Stewart*, 549 U.S. 147, 157 (2007)).

The majority also concluded that Bowles could not file a habeas petition under 28 U.S.C. § 2241. The majority explained that a habeas petitioner may not avoid the various procedural restrictions imposed on § 2254 petitions by bringing suit under § 2241. *Bowles*, 2019 WL 3946888 at *5 (citing cases). "So that avenue is closed to Bowles as well." *Id.*

Standards for authorizing successive habeas petitions

Neither of the two statutory exceptions to the prohibition on successive habeas petitions in § 2244(b)(2) apply to Bowles. The two statutory exceptions in § 2244(b)(2) are:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

But *Hall v. Florida* is not a basis for granting authorization to file a successive habeas petition under the first exception in § 2244(b)(2)(A) because this Court has not held that *Hall v. Florida* is retroactive. *Tyler v. Cain*, 533 U.S. 656 (2001). Opposing counsel improperly attempts to rely on the Florida Supreme Court's decision in *Walls v. State*, 213 So.3d 340, 346 (Fla. 2016), to meet this exception. But the first exception explicitly requires that this Court, not the Florida Supreme Court or any other lower court, make the new rule of constitutional law retroactive. The first exception does not apply in this case.

Alternatively, even if the second exception in § 2244(b)(2)(B) applies to claims of intellectual disability rather than being limited to claims of actual innocence of the underlying offense, as the text of the statute provides and as several circuit courts have held,[2] Bowles still cannot meet the remaining requirements of the second exception. Regarding any new "factual predicate" for the claim of intellectual disability under the second exception in § 2244(b)(2)(B), the only significant new evidence in this case regarding intellectual disability is the October 2017 IQ testing from Dr. Toomer. But, as the Seventh Circuit has warned, there "would never be any finality to capital cases" involving intellectual disability claims if new IQ tests taken while in prison acts to

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[2] *In re Hill*, 715 F.3d 284, 297-301 (11th Cir. 2013) (refusing to recognize claims of innocence of the penalty and limiting the second exception to claims of innocence of the underlying crime); *In re Webster*, 605 F.3d 256, 258-59 (5th Cir. 2010) (same); *Davis v. Kelley*, 854 F.3d 967, 971 (8th Cir. 2017).

restart legal provisions because, "it would always be possible to conduct more I.Q. and adaptive functioning tests in the prison." *Webster v. Daniels*, 784 F.3d 1123, 1140-41 (7th Cir. 2015) (limiting any saving provision in § 2255(e), which applies to federal prisoners, to "new" evidence of intellectual disability that was not "newly created; instead, it must be previously existing evidence of his intellectual disability that counsel did not uncover despite diligent efforts"). But even using the date of the IQ testing in October of 2017, any *Atkins* claim remains untimely because the application to file a successive habeas petition raising the intellectual disability claim was not filed until August of 2019, which is over one year later. The application to raise the intellectual disability claim in a successive habeas petition was filed approximately 10 months late. But even more importantly, Bowles cannot establish by ***clear and convincing evidence*** as required by § 2244(b)(2)(B)(ii), that a reasonable factfinder would have found him to be intellectually disabled. As the State will explained in grater detail, Bowles is not intellectually disabled. No reasonable factfinder would find Bowles to be intellectually disabled given his school records which are the most reliable evidence of his intellectual abilities because they were generated at a time he had no reason to slant his intellectual abilities, as he does now. *Commonwealth v. Hackett*, 99 A.3d 11, 33 (Penn. 2014) (noting capital defendants have a "powerful incentive to malinger and to slant evidence" after *Atkins*, making the third prong crucial). Bowles' school records are the most reliable evidence of his intellectual functioning and those records establish that Bowles is not intellectually disabled. The second exception for filing successive habeas petitions in § 2244(b)(2) does not apply in this case either.

No conflict with this Court's jurisprudence

There is no conflict with this Court's successive habeas jurisprudence and the Eleventh Circuit's denial of motion to stay. Bowles argues his habeas petition is a second petition, not a successive petition relying on the exception established in *Panetti*

v. Quarterman, 551 U.S. 930 (2007). But the *Panetti* exception does not apply. The *Panetti* exception to successive habeas petitions is limited to claims that were not ripe at the time the first habeas petition was filed, such as a claim of incompetency to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986), which was the claim at issue in *Panetti*. *Tompkins v. Sec'y, Dept. of Corr.*, 557 F.3d 1257, 1259-60 (11th Cir. 2009) (noting the *Panetti* case involved a *Ford* claim and the High Court was careful to limit its holding to *Ford* claims and reasoning that, in contrast to *Panetti*, the claims Tompkins wanted to raise were claims that "can be and routinely are raised in initial habeas petitions"); *Busby v. Davis*, 925 F.3d 699, 713 (5th Cir. 2019) (contrasting *Ford* claims with *Atkins* claims explaining that while incompetency is not a permanent condition but one that "may occur at various points after conviction, and it may recede and later reoccur" but intellectual disability by definition is a permanent condition and concluding for that reason it is not proper to apply the law regarding *Ford* claims wholesale to *Atkins* claims). Any habeas claim that can be, and routinely is, raised in initial habeas petitions does not fall into the *Panetti* exception.

Atkins claims can be, and routinely are, raised in initial habeas petitions, so such claims do not fall within the *Panetti* exception. Intellectual disability claims based on *Atkins* claim are ripe to be challenged at any time after the sentence is imposed. *Davis v. Kelley*, 854 F.3d 967, 971-72 (8th Cir. 2017) (concluding that *Atkins* claims are ripe when the sentence is imposed and observing that *Panetti* "has no force or applicability"). Rather, such claims are considered successive habeas claims for which authorization from the respective circuit court is required. In this case, the *Atkins* claim could have been raised in the first habeas petition filed in 2008 which was years after *Atkins* was decided in 2002. The *Panetti* exception does not apply to *Atkins* intellectual disability claims and therefore, this intellectual disability claim remains a successive habeas claim over which the district court lacked jurisdiction.

There is no conflict between this Court's decision in *Panetti* and the Eleventh

Circuit's denial of the motion to stay.

No conflict with any federal appellate court

There is no conflict between the Eleventh Circuit's decision and that of any federal appellate court regarding the issue of whether the *Panetti* exception applies to second habeas petitions. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). In the absence of such conflict, certiorari is rarely warranted.

There is no conflict between the Eleventh Circuit's decision in this case and any other circuit court's decision. The two other circuits that have reached the issue, the Fifth Circuit and the Eighth Circuit, agree with the Eleventh Circuit that *Panetti* does not apply to *Atkins* claims. Indeed, the majority in this case cited to the other circuit cases as support of its conclusion that *Panetti* did not apply. *Bowles*, 2019 WL 3946888 at *5 (citing *Busby v. Davis*, 925 F.3d 699, 713 (5th Cir. 2019); and *Davis v. Kelly*, 854 F.3d 967, 971-72 (8th Cir. 2017)). Opposing counsel does not, and cannot, point to any circuit court case holding *Panetti* applies to *Atkins* intellectual disability claims allowing such claims to be raised in a successive habeas petition when the first habeas petition was filed after *Atkins* was decided. There is no conflict between the Eleventh Circuit's decision and that of any other federal appellate court.

28 U.S.C. § 2241 petitions

Bowles attempts to invoke 28 U.S.C. § 2241 to evade the statutory limitations on filing a successive habeas petition in 28 U.S.C. § 2254. But Bowles may not file a § 2241 petition. "It is axiomatic that § 2254 applies where a prisoner is in custody

pursuant to the judgment of a State court," not § 2241. *Johnson v. Warden, Ga., Diagnostic & Classification Prison*, 805 F.3d 1317, 1323 (11th Cir. 2015) (denying authorization to file a successive habeas petition in a case where a state petitioner filed a § 2241 petition in an active warrant case citing *Thomas v. Crosby*, 371 F.3d 782, 787 (11th Cir. 2004)). Otherwise, allowing state prisoners to file § 2241 petitions would render § 2254 a "complete dead letter" that serves "no function at all." *Medberry v. Crosby*, 351 F.3d 1049, 1060 (11th Cir. 2003). A state prisoner directly attacking his conviction or sentence must use § 2254 to do so. *In re Wright*, 826 F.3d 774 (4th Cir. 2016) (dismissing a § 2241 petition and holding a convicted state prisoner challenging his sentence is required to apply for authorization to file a successive habeas petition regardless of how it "was styled" and noting the majority view of the circuits is that § 2241 habeas petitions from convicted state prisoners challenging the execution of a sentence are governed by § 2254 citing circuit cases).[3] Bowles is directly challenging his death sentence, and therefore he must proceed under § 2254. Bowles may not file a § 2241 petition raising an *Atkins* claim.

Furthermore, § 2241 is not an avenue around the limits on successive habeas petitions including the limits on successive petitions contained in § 2244(b) and the requirement of prior authorization in § 2244(b)(3)(A). A "state prisoner cannot evade the procedural requirements of § 2254 by characterizing his filing as a § 2241 petition." *Johnson*, 805 F.3d at 1323; *Antonelli v. Warden, U.S.P. Atlanta*, 542 F.3d 1348, 1351 (11th Cir. 2008) (stating that "a prisoner collaterally attacking his conviction or

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[3] Only the Tenth Circuit permits § 2241 petitions to be filed in place of § 2254 petitions but that circuit has imposed limitations on such § 2241 petitions. *In re Wright*, 826 F.3d at 778 (citing *Hamm v. Saffle*, 300 F.3d 1213, 1216 (10th Cir. 2002)). Indeed, Bowles' § 2241 petition would be considered untimely in the Tenth Circuit. *In re Wright*, 826 F.3d at 778 (noting that § 2241 petitions by state prisoners are subject to the one-year statute of limitations citing *Dulworth v. Evans*, 442 F.3d 1265, 1267-68 (10th Cir. 2006)). So, there is no circuit in which Bowles could file his *Atkins* claim in a § 2241 petition and be heard on the merits.

sentence may not avoid the various procedural restrictions imposed on § 2254 petitions ... by nominally bringing suit under § 2241"). It would "thwart Congressional intent" to allow state prisoners to file § 2241 petitions rather than being required to file § 2254 petitions. *Medberry v. Crosby*, 351 F.3d 1049, 1060 (11th Cir. 2003); *see also In re Wright*, 826 F.3d 774, 780-81 (4th Cir. 2016) (explaining that allowing state prisoners to proceed under § 2241 alone, and ignoring § 2254, would "undermine the limitations created by § 2254" and "we do not believe Congress intended to undermine a carefully drawn statute like section 2254 through a general provision like section 2241"). Bowles may not invoke § 2241 to evade the restrictions in § 2244 and § 2254.

The cases cited by opposing counsel involved federal prisoners and are § 2255 cases which depend on the saving clause in § 2255(e). The "saving clause" in § 2255(e) provides: "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." But there is no equivalent to § 2255(e) in § 2254.[4] The saving clause

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[4] There is a provision in § 2254(b)(1), which provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

But § 2254 (b)(1)(B) is an exception to the exhaustion requirement, not a saving clause provision. It merely provides that a federal habeas petition does not have to exhaust a claim in state court if there are no means to do so or if there are unusual circumstances preventing exhaustion. This is not the same as the provision governing

is limited to federal prisoners and § 2255 cases; it does not apply to state prisoners and § 2254 cases.

There is no circuit split regarding the issue. There is no circuit in which Bowles could file his *Atkins* claim in a § 2241 petition and be heard on the merits. There is no conflict between the Eleventh Circuit's decision and that of any other circuit court case.

Bowles is not intellectually disabled

Under both the Florida statute and Florida Supreme Court precedent, a capital defendant must establish three prongs to show intellectual disability: 1) significantly subaverage general intellectual functioning; 2) concurrent deficits in adaptive behavior; and 3) manifestation of the condition before age eighteen. § 921.137(1), Fla. Stat. (2018); *Salazar v. State*, 188 So.3d 799, 811 (Fla. 2016). If a defendant fails to

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federal prisoners in § 2255(e). While there is the odd case applying the saving clause reasoning to a state prisoner in § 2254 cases, there is no statutory basis for doing so. These few odd cases often involve unusual facts but they do not explain why saving clause reasoning applies in § 2254 cases when § 2254 does not contain a saving clause provision.

Moreover, even as an excuse from exhaustion, § 2254(b)(1)(B)(ii) does not apply to this case. There are no unusual circumstances that prevented proper exhaustion of the *Atkins* claim in state court. And to the extent that opposing counsel is attempting to use the ineffectiveness of state postconviction counsel for not raising the claim during the initial state postconviction proceedings or ineffectiveness of federal habeas counsel for not raising the *Atkins* claim in the initial petition, that is not an unusual circumstance. Indeed, § 2254 prohibits the use of ineffectiveness of postconviction counsel in federal habeas proceedings as a basis for relief. § 2254(i) (providing: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.").

Furthermore, the problem here is not merely failure to properly exhaust the *Atkins* claim, but, rather, that the *Atkins* claim is both unexhausted and ***successive***. There certainly is no statutory basis for invoking § 2254(b)(1)(B)(ii) to evade the limitations on successive petitions. So, even if § 2254(b)(1)(B)(ii) is applied to excuse the failure to exhaust the *Atkins* claim, the limitations on successive claims would remain.

prove any one of these three prongs, "the defendant will not be found to be intellectually disabled." *Quince v. State*, 241 So.3d 58, 62 (Fla. 2018). Under the statute, a capital defendant must show that he is intellectually disabled by clear and convincing evidence. § 921.137(4), Fla. Stat. (2018); *Wright v. State*, 256 So.3d 766, 771 (Fla. 2018) ("a defendant must make this showing by clear and convincing evidence" citing § 921.137(4), Fla. Stat.), *cert. denied, Wright v. Florida*, 139 S.Ct. 2671 (June 3, 2019) (No. 18-8653). But Bowles fails all three prongs.

Significant subaverage intellectual functioning

The first prong of the test for intellectual disability is significant subaverage intellectual functioning. Bowles' current intellectual functioning is not "significantly subaverage." When multiple IQ scores are present, they should be considered collectively. *Hall*, 572 U.S. at 714 (stating that the "analysis of multiple IQ scores jointly is a complicated endeavor" citing Schneider, *Principles of Assessment of Aptitude and Achievement*, in The Oxford Handbook of Child Psychological Assessment 286, 289-91, 318 (D. Saklofske, C. Reynolds, V. Schwean, eds., 2013)); *Hall*, 572 U.S. at 742 (Alito, J., dissenting) (noting the "well-accepted view is that multiple consistent scores establish a much higher degree of confidence").

The three defense experts' IQ scores of 80, 83, and 74, considered collectively, do not establish significantly subaverage general intellectual functioning. Considered collectively, Bowles' IQ is between 77 and 79.[5] An IQ of 77 is not significantly

[5] There are three IQ scores in the current record. Dr. Elizabeth McMahon, the defense expert hired by the Public Defender's Office prior to the first penalty phase, testified via depositions in the state postconviction proceedings. Dr. McMahon administered the Wechsler Adult Intelligence Scale - Revised (WAIS-R) in 1995. According to Dr. McMahon, Bowles' full-scale IQ score was 80. (PCR 196, 239). Dr. Harry Krop, the defense expert in the initial state postconviction proceedings, administered the Wechsler Abbreviated Scale of Intelligence (WASI) in April of 2003. Dr. Krop, in his written report dated April 21, 2003, reported Bowles' IQ to be 83. Dr.

subaverage intelligence. Bowles' collective IQ score is above 75. So, it falls outside of the statistical error of measurement of 75 or below set by the United States Supreme Court in *Hall v. Florida*. Bowles fails the first prong.

Adaptive functioning

The second prong is significant deficits in adaptive functioning. Deficits in adaptive functioning is currently defined as deficits in one of three broad categories or "domains": conceptual, social, and practical. *Wright v. State*, 256 So.3d 766, 773 (Fla. 2018) (citing DSM-V), *cert. denied*, *Wright v. Florida*, 2019 WL 1458194 (June 3, 2019).

Bowles does not have significant deficits in adaptive functioning. Bowles obtained his General Education Development (GED) diploma. Dr. McMahon, the

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Jethro Toomer, the defense expert in the current successive postconviction motion, stated that he administered the WAIS-IV to Bowles in October of 2017. According to Dr. Toomer's report, Bowles' full scale IQ score was 74.

So, the three IQ scores in the existing record are 80, 83, and 74. The average of Bowles' three IQ scores is 79. The median of Bowles' three IQ scores is 78.5. Opposing counsel objects to the use of the score of 83 because it was obtained using an abbreviated IQ test. Even discounting that score, Bowles' collective IQ remains above 75. Using only the two IQ scores of 80 and 74, the average of 80 and 74 is 77. And the median is 77 as well. Either way, Bowles' collective IQ score is above 75.

Another means of considering IQ scores collectively, referred to by the *Hall* majority, is a "composite" score. *Hall v. Florida*, 572 U.S. at 714 (citing to Schneider, *Principles of Assessment of Aptitude and Achievement* at 289-91). Schneider has a formula for determining the "composite" score. The author acknowledges that an average is a "rough approximation of a composite score," but he advocates the use of a "composite" score in cases of low and high scorers. *Id.* at 290. But the author does not explain why using the median instead of the mean does not accomplish much the same goal in the case of low scorers.

But, instead of using the composite score, opposing counsel simply ignores the prior IQ score of 80 but that is not mathematically sound. Neither the majority nor the dissent in *Hall* took the position that prior IQ scores were simply to be ignored, much less the position that prior IQ scores from ***defense*** experts should be ignored. Regardless of the particular method, the IQ scores should be considered collectively as is standard mathematical practice when measuring the same phenomena, such as IQ scores.

defense mental health expert hired pre-trial, testified in her deposition that Bowles obtained his GED diploma while incarcerated at DeSoto Correctional Institution. (Depo at 62). Dr. Krop also testified at the 2005 evidentiary hearing that Bowles had obtained his GED. (PCR Vol. II 148). Obtaining a GED is "clear evidence" and "direct proof" that the defendant does not suffer from adaptive deficits. *Dufour v. State*, 69 So.3d 235, 251 (Fla. 2011) (stating that obtaining a GED diploma, which involves "a battery of questions that generally emphasize the ability to read, write, think, and solve mathematical problems" is "clear evidence" and "direct proof" that "a deficit in adaptive behavior does not exist"); *see also Williams v. State*, 226 So.3d 758, 773 (Fla. 2017) (stating the "fact that Williams successfully obtained his GED diploma supports the conclusion that he does not suffer from adaptive deficits" citing *Dufour*, 69 So.3d at 250), *cert. denied, Williams v. Florida*, 138 S.Ct. 2574 (2018). The Florida Supreme Court in *Williams* recounted Dr. Prichard's testimony that he "has not encountered an intellectually disabled person who can pass even a single section of the GED test, let alone the entire examination." *Williams*, 226 So.3d at 771.

Bowles made many statements in his confession which contradict any claim of adaptive deficits. Bowles talked about making phone calls and driving victims' cars. (TR 581, 636-38, 748, 776-77). Though Bowles had his own driver's license, he procured fake identification with his picture under the name of Timothy Whitfield by using a Social Security card and birth certificate found at one of his victim's homes. (TR 605, 699). A driver's license is evidence of adaptive functioning, not adaptive deficits. *State v. Rodriguez*, 814 S.E.2d 11, 20 (N.C. 2018) (recounting the testimony of the State's expert, Stephen Kramer, M.D., a forensic neuropsychiatrist and professor of psychiatry at Wake Forest Baptist Medical Center, who testified that the ability to pay taxes and to obtain a driver's license showed that defendant had a level of adaptive functioning beyond that expected of those with intellectual disability and the testimony of one of the defense experts, Dr. John Olley, a professor at the University of North

Carolina at Chapel Hill and a psychologist at the Carolina Institute for Developmental Disabilities, who testified that only one-third of mildly intellectually disabled persons are able to obtain a driver's license or learner's permit); *Oats v. State*, 181 So.3d 457, 464 (Fla. 2015) (noting that "Oats was never able to obtain a driver's license" which could be evidence of deficits in adaptive functioning).

Bowles admitted in the confession that he was planning to drive the victim's car from Florida to his mother's in Branson, Missouri, but ran out of money in Tennessee, so he left the car and got a bus ticket to travel the rest of the way. (TR 783). So, Bowles knows how to travel and use the national bus system. *Wright v. State*, 256 So.3d 766, 778 (Fla. 2018) (explaining that the testimony that he "knew how to use the city bus system" which cuts "against a finding of adaptive deficits in the conceptual domain" and affirming the trial court's finding that the defendant failed to prove the second prong of adaptive deficits); *Hodges v. State*, 55 So.3d 515, 535 (Fla. 2010) (affirming the trial court's finding that the defendant failed to prove the second prong of adaptive deficits, noting Hodges was capable of traveling independently to and from work and from Ohio to Alabama and Florida and was capable of driving without anyone instructing him on how to get to his destination and of arranging travel by bus).

Furthermore, Bowles can read and write which also cuts against a finding of adaptive deficits. Bowles reads at a high school level and is at a sixth or seventh grade level "in terms of spelling and arithmetic." (PCR Vol. 148). One of the defense experts, Dr. Kessel, noted in her report that Bowles "would write letters to his mother constantly" and that he can "write and read a sentence." Bowles' ability to read and write rebuts any claim of adaptive deficits. *Hodges v. State*, 55 So.3d 515, 535 (Fla. 2010) (affirming the trial court's finding that the defendant failed to prove the second prong of adaptive deficits based in part on the defendant's ability to read and write).

Additionally, Bowles' employment history negates the claim of adaptive deficits.

Phillips v. State, 984 So.2d 503, 511 (Fla. 2008) (affirming the trial court's finding that the defendant failed to prove the second prong of adaptive deficits based in part on the defendant's jobs as a short-order cook, a garbage collector, and a dishwasher which are job skills that people with mental retardation normally lack and recounting that the defense expert admitted that a position "as a short-order cook was an 'unusually high level job'" for someone who is intellectually disabled). Bowles had various jobs including working on an oil rig for two years. (Record at 754-60; Depo at 62). Bowles was also employed as a machinist and a roofer. (PCR 2019 at 796).

Moreover, any deficits that Bowles may have may well be due to his anti-social personality disorder and not a function of his intellectual ability at all. In the initial postconvition proceedings, the defense expert, Dr. Krop, diagnosed Bowles with anti-social personality disorder. (PCR Vol. II at 110, 137). Poor impulse control is also one of the symptoms of anti-social personality disorder. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 706 (rev. 4th ed. 2000) (DSM-IV) (detailing the seven criteria for anti-social personality disorder including impulsivity). Bowles fails the second prong as well.

Onset as a minor

The third prong is onset of the condition prior to age 18. Bowles was not intellectually disabled as a child. Parts of Bowles' school records from Kankakee Illinois School District 111 were discussed during the 2005 postconviction evidentiary hearing. Bowles was not in special education classes. Bowles made As and Bs in the first grade in regular classes. His grades in first grade were an A, a B, another B, and another A. Bowles made As and B+s in math in the early grades of elementary school. A child who is intellectually disabled does not make As in math in regular classes in elementary school. Furthermore, one of the handwritten notations on his achievement tests in his school records is "high normal." A child with intellectual disability cannot

make "high normal" scores on achievement tests.

The school records also show that Bowles' grades declined over the years with his declining attendance. Indeed, one comment in the school records regarding the extent of his absences was that Bowles was "never present!!" The defense mental health expert, Dr. McMahon, testified that in sixth or seventh grade, Bowles' "grades went from A's, B's, and C's to D's and F's as he started skipping school." (Depo at 66, 72, 74). Bowles' grades dropping coincides with the start of his drug use around ten years old. (Depo 66). While opposing counsel refers to another defense expert's opinion that Bowles' declining grades were due to moving from concrete concepts to abstract concepts in the higher grades, such a statement does not negate the other explanation for his declining grades from another ***defense*** mental health expert that he was skipping school or the contemporaneous notation in the actual school records that Bowles was "never present" and certainly not by ***clear and convincing*** evidence. And regardless of the reason for his declining grades, Bowles cannot establish the third prong in the face of the "high normal" scores on numerous achievement tests. Bowles did not have any problem with abstract concepts when taking achievement tests. Again, a child with intellectual disability cannot make "high normal" scores on achievement tests. Bowles also fails the third prong.

As the Pennsylvania Supreme Court has explained, the onset prong is often the most reliable evidence of intellectual disability because it is generated at a time when there is no incentive to slant the evidence. *Commonwealth v. Hackett*, 99 A.3d 11, 33 (Penn. 2014) (noting capital defendants have a "powerful incentive to malinger and to slant evidence" after *Atkins*, making the third prong crucial). Bowles' school records are the most reliable evidence of his intellectual functioning and those records establish that Bowles is not intellectually disabled.

Bowles fails all three prongs of the test for intellectual disability. Bowles is not intellectually disabled. He certainly cannot make a *prima facie* showing as required

to file a successive habeas petition taking into account the standard of proof of clear and convincing evidence required by both the federal statute to warrant filing a successive habeas petition and by Florida's intellectual disability statute. *Prieto v. Zook*, 791 F.3d 465, 469-73 (4th Cir. 2015) (emphasizing the standard of proof necessary to obtain authorization to file a successive habeas petition raising an intellectual disability claim and holding the defendant did not meet that standard); *Frazier v. Jenkins*, 770 F.3d 485, 497-99 (6th Cir. 2014) (emphasizing the standard of proof necessary to obtain authorization to file a successive habeas petition raising an intellectual disability claim and holding the defendant did not meet that standard).

Accordingly, this Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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